APPENDIX "A".

SUPREME COURT, NEW YORK COUNTY, SPECIAL TERM, PART I.

DANIEL DE GORTER and HENRI WILD, Assignees of Banque National de Belgique, *Plaintiffs*,

against

BANQUE DE FRANCE, Defendant.

Filed Aug. 9, 1941, New York County Clerk's Office.

BENVENGA, *J.*:

Motion for judgment dismissing the complaint herein, on the ground that the courts of this state are without jurisdiction of the person of the defendant and of the subject-matter of the action.

The action is for breach of contract and conversion, brought by residents of New York, assignees of the Banque Nationale de Belgique, a foreign banking corporation, against the Banque de France, also a foreign banking corporation.

It is alleged that between November, 1939 and May, 1940, immediately after the outbreak of the European War, the Banque de Belgique delivered gold of the value of more than $228,000,000 to the Banque de France for safekeeping, on the understanding that the Banque de France would, on demand, return the gold to the Banque de Belgique; that in June, 1940, just before the armistice between France and Germany, the Banque de Belgique demanded the return of the gold and it was refused.

It is not disputed that, as a rule, the general jurisdiction of the courts of this state extends to transitory causes of action of the nature here involved (Gregonis *v.* Coal & Iron Co., 235 N. Y. 152, 158-159; McCauley *v.* Georgia Bank, 239 N. Y. 514; Matter of Baltimore Mail S. S. Co. *v.* Fawcett, 269 N. Y. 379, 385), it is contended, however, that this court lacks jurisdiction of the subject matter, because in

the contract sued upon, the parties have expressly agreed to the exclusive jurisdiction of the courts of France.

Whatever the effect of such a stipulation may be in other jurisdictions, it is wholly ineffectual here. An agreement by which parties to a contract undertake to oust the courts or tribunals of this state of jurisdiction over controversies between the parties thereafter arising out of the contract and to confer exclusive jurisdiction to determine such controversies upon a foreign tribunal, is against public policy, null and void. (Sudbury *v.* Ambi, 213 App. Div. 98, 102-103; Sliosberg *v.* Ins. Co., 217 App. Div. 685, 688-689; Parker *v.* Krauss Co., 157 Misc. 667, 669; Aff'd. 249 App. Div. 718).

It is also contended that this court lacks jurisdiction of the person of the defendant, because the exercise of jurisdiction would conflict with the commerce clause of the Federal Constitution (U. S. Const., Art. 1, Sec. 8, Cl. 3), in that it would cast an undue and unreasonable burden upon interstate and foreign commerce.

Under this clause, nonresident corporations engaged in interstate or foreign commerce have been held not subject to suit, unless the cause of action grew out of business transacted within the territory of the forum (Guerin Mills *v.* Barrett, 254 N. Y. 380, 385; Brood *v.* Aluminum Co., 231 App. Div. 693, 698). But this rule, concededly, has been applied only to common carriers directly engaged in the transportation of persons or things in interstate commerce; it has never been applied to interstate or foreign corporations engaged in the banking business. Nor can the rule be so applied; at least, not to foreign banking corporations which, like those here involved, are not commercial banks, but central banks of issue, it seems that such banks customarily carry with other central banks, particularly at important financial centers, substantial amounts of gold and credit balances in order to discharge debts and credits arising out of relations between themselves. Their activities are highly specialized and limited. They are not engaged in foreign commerce within the meaning of the constitutional provision. At all events, such relationship as their activities may have to foreign commerce is but indirect and incidental. Accordingly, even assuming that the Banque de France is

engaged in foreign commerce, the prosecution of the action in the courts of this state would not impose upon it "a burden so heavy and so unnecessary as to be oppressive and unreasonable" within the meaning of the constitutional provision. "Such a suit may be a burden, but oppressive and unreasonable it is not" (International Milling Co. *v.* Columbia Transportation Co., 292 U. S. 511, 519, 520).

The motion is denied.

Dated, August 8th, 1941.

F. C. B. *J. S. C.*

APPENDIX "B".

In the Matter of the Application of BANQUE DE FRANCE, *Appellant,*

against

THE SUPREME COURT OF THE STATE OF NEW YORK, et al., *Respondents.*

(Decided March 5, 1942.)

Appeal by petitioner from the unanimous order of the Appellate Division, first department, dismissing as a matter of law a petition to restrain a judge from hearing the cause. Constitutional question involved.

Mahlon B. Doing and Frederic R. Coudert for appellant.

John Foster Dulles, Robert E. Houston, Jr. and MacDonald Deming for Daniel de Gorter et al., respondents.

LEHMAN, *Ch. J.:*

Banque de France is a corporation organized and existing under the laws of France. In France it conducts its business as the central bank of issue of France and as a commercial bank. Such business as it transacts here is purely incidental to its business in France, but in the course of that business it customarily maintains large bank balances here. Daniel de Gorter and Henri Wild are residents of the State of New York. Claiming that Banque

National de Belgique, a corporation organized and existing under the laws of Belgium, has a good cause of action against Banque de France for breach of contract and that Banque National de Belgique has assigned its cause of action to them, they obtained a warrant of attachment against the property here of Banque de France and levied upon the accounts and property of the Banque de France held by Federal Reserve Bank in New York. After a summons was served by publication upon Banque de France, it appeared specially in order to challenge the jurisdiction of the courts of the State of New York in the action which the assignees of Banque National de Belgique seek to maintain in this state. Its challenge was rejected in the Supreme Court and the order was affirmed by the Appellate Division, which denied leave to appeal to this court. After Banque de France had thus unsuccessfully sought by every available means to induce the court in which the action was brought to refuse to exercise jurisdiction and to dismiss the complaint, it applied to the Appellate Division, pursuant to the provisions of article 78 of the Civil Practice Act, for an order prohibiting and restraining the Supreme Court or any justice of the court from entertaining or exercising jurisdiction of the action.

The Appellate Division, upon motion of the respondents, dismissed the petition of Banque de France "as matter of law and not in the exercise of discretion". The petitioner seeks an extraordinary remedy to halt threatened action by a court or judge which the petitioner contends would be a usurpation of power. The General Corporation Law (Cons. Laws, ch. 23) provides that "an action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action." (Sec. 224.) Transitory causes of action arising outside of the state are within the general jurisdiction of the courts of the state when brought by a resident of the state even though the defendant be a foreign corporation and the plaintiff be the assignee of a person not himself a resident of the state. There are nevertheless limitations upon the general jurisdiction of the courts of this state imposed by the Constitution of the United States.

A state may not encroach upon the field where the power of the federal government is exclusive and "the general jurisdiction of the courts of a state is confined to the field from which the state itself is not excluded." (*Matter of Baltimore Mail S. S. Co. v. Fawcett,* 269 N. Y. 379, 385.) In that case this court held that in circumstances where compulsion by a state upon a foreign corporation, engaged in foreign or interstate commerce, to submit a suit in its courts upon a transitory cause of action arising in a different jursdiction would constitute an unreasonable burden and an obstruction of commerce forbidden by the Constitution of the United States, the carrier may be entitled to an order prohibiting the State court from attempting to exercise jurisdiction of the suit. The Banque de France asserts that on that ground it is entitled to such an order for the necessary protection of its constitutional rights.

In all the cases where it has been held that such compulsion is beyond the power of a state and a violation of rights or immunities guaranteed by the Constitution, the foreign corporation has been engaged in commerce as a carrier. The Banque de France asserts that the principle applies wherever such compulsion casts an unreasonable burden upon a foreign corporation engaged in foreign or interstate commerce in any form and is not confined to obstruction of transportation of passengers or goods. Doubtless the power of the Congress of the United States "to regulate Commerce with foreign Nations, and among the several States" (U. S. Const., art. I, sec. 8, cl. 3) extends to foreign and interstate commerce of every kind and is not confined to transportation. Though a foreign corporation engaged in foreign or interstate commerce as carrier or otherwise is not "immune from the ordinary process of the courts of a State," yet no state may intrude upon the field assigned by the Constitution to the federal government. At least in theory, state laws which unreasonably obstruct and unduly burden interstate commerce in any form may violate the commerce clause of the Constitution. (*Davis v. Farmers Cooperative Equity Co.,* 262 U. S. 312, 316.) The principle upon which the petitioner relies is general; yet when that principle is invoked to support the contention

that in a particular case a law of the State of New York is obnoxious to the commerce clause of the Constitution, then the nature of the function which the foreign corporation performs in foreign or interstate commerce may be the decisive factor in applying the test whether the assertion of jurisdiction casts "a serious and unreasonable burden" upon the corporation, a burden which unduly obstructs interstate commerce. It is significant that no case can be found where the general principle has led to the conclusion that the assertion of plenary jurisdiction by a state court in any transitory action against a foreign corporation is obnoxious to the commerce clause where such a foreign corporation has not been engaged in the business of a carrier. In every case beginning with *Davis v. Farmers Cooperative Equity Co. (supra)*, the court has based its decision upon the effect which compulsion upon a carrier to submit to suit upon causes of action arising in other states would have upon the business of a carrier in view of the nature of that business. (See *Matter of Baltimore Mail S. S. Co. v. Fawcett, supra,* and especially *International Milling Co. v. Columbia Transportation Co.*, 292 U. S. 511, and cases there cited.) The contention of the Banque de France finds little support in those cases.

We assume that Banque de France, *the central bank of issue* of France, does business and exercises functions connected with commerce with the United States and which tend to promote such commerce. Even upon that assumption the question here presented is not, as the petitioner contends, "Are the principles of immunity under the Commerce Clause which are applied in the decision of this Court in the case of *Baltimore Mail S. S. Co.* v. *Fawcett*, 269 N. Y. 389, and in the decisions of the United States Supreme Court therein followed, applicable only in favor of corporate common carriers, or do they extend equally to all other foreign corporations engaged in interstate or foreign commerce?" The question which must be decided upon this appeal is whether under the principles of immunity under the commerce clause (U. S. Const. art. I, sec. 8), applied in the case of *Matter of Baltimore S. S. Co.* v. *Fawcett* (*supra*), the exercise of jurisdiction by the Supreme Court

of the state in *this* suit which *these* plaintiffs have attempted to bring against *this* defendant in accordance with the laws of this state, is obnoxious to the commerce clause.

The test which dictates a negative answer in this case has been authoritatively stated by the Supreme Court of the United States. "Even a foreign corporation is not immune from the ordinary processes of the courts of a State where its business is entirely interstate in character. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579. It must submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened." (*Hoffman* v. *Foraker*, 274 U. S. 21, 23.) In the cases upon which the petitioners rely the courts gave weight to the disruption in the performance by interstate carriers of their function of transportation which might follow from the application and enforcement of the law of a state which would compel foreign corporations to submit to suit there in a case where the foreign corporation is an interstate carrier engaged in business in that state only incidentally connected with its business as a carrier in other states, where the cause of action arose outside of the jurisdiction in favor of a person not then a resident of the state and where "the suit might more conveniently be litigated in another forum available equally to both parties." (Cf. *B. & O. R. R.* v. *Kepner*, 314 U. S. 44, decided by the Supreme Court of the United States November 10, 1941.)

In this case the opposing considerations to be weighed are quite different. Banque de France customarily maintains here large balances which it uses in the course of its business. It has sent here gold of the value of hundreds of millions of dollars. It alleges that the accounts here upon which the plaintiff has levied are worth over seven hundred million dollars. If we sustain its contention that its property here is immune from process of the courts of this state in an action brought here by persons claiming to be assignees of the foreign owner of a cause of action for conversion of gold in France or for breach of contract made in either France or Belgium, these plaintiffs, though residents of this state, must resort to the courts in Belgium or

in Paris, jurisdictions occupied by Germany, a power with which this country is at war, or at best to the courts in unoccupied France, a country which accepts as law the decrees of the group of men who claim under the aegis of Germany to be authorized to act as the government of Belgium, though the United States recognizes as the only legitimate government of Belgium the group of exiles who are exercising in a country not subject to the domination of Belgium's conquerors governmental power entrusted to them by the laws of Belgium. To relegate the plaintiffs, though residents of New York, to the courts of a country which refused to recognize the government of Belgium or to enforce decrees upon which the title of the plaintiffs depends is, in effect, to deny to them any right to litigate in any tribunal their rights under the laws of Belgium as promulgated by its legitimate government.

Nothing that we have said should be construed as indicating that in our opinion the plaintiffs' assignment is valid in fact or in law or that the plaintiffs are entitled to recover if they prove all the allegations of the complaint. These are matters which must be determined by the court in which the action is brought and which we may not consider upon this appeal. We decide only that the defendant is not immune from suit in the courts of this state; and that the assertion of jurisdiction in this case by the courts of this state tends to promote "orderly, effective administration of justice" and casts no undue burden upon the performance by the defendant of any function in interstate commerce which may be incidental to its banking business.

The order should be affirmed, with costs.

Loughran, Finch, Rippey, Lewis, Conway and Desmond, JJ. concur.

Order affirmed.

APR 17 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1154

BANQUE DE FRANCE,

Appellant,

vs.

THE SUPREME COURT OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION.

JOHN FOSTER DULLES,
JOHN C. BRUTON,
Counsel for Appellees.

SULLIVAN & CROMWELL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1154

IN THE MATTER OF THE APPLICATION OF BANQUE DE FRANCE,

Petitioner-Appellant,

For An Order of Restraint

against

THE SUPREME COURT OF THE STATE OF NEW YORK, HON. FELIX C. BENVENGA, INDIVIDUALLY AND AS ONE OF THE JUSTICES THEREOF, AND DANIEL DE GORTER AND HENRY WILD, AS ASSIGNEES OF BANQUE NATIONALE DE BELGIQUE,

Respondents-Appellees.

STATEMENT BY APPELLEES OF GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ASSERTED BY THE APPELLANT, PURSUANT TO RULE 12.

Pursuant to United States Supreme Court Rule 12, paragraph 3, the above named appellees present this, their statement, disclosing the matter or ground making against the jurisdiction of the Supreme Court of the United States

to review on appeal the judgment appealed from herein as follows:

I. The statute of the state, which is involved in this action, is Section 224 of the General Corporation Law of the State of New York (§ 224, L. 1909, ch. 28) which provides:

> "An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action."

II. The Court of Appeals of the State of New York has construed the above quoted statute to be inapplicable where the maintenance of an action thereunder imposes an undue and unreasonable burden upon interstate or foreign commerce. *Matter of Baltimore Mail S. S. Co.* v. *Fawcett*, 269 N. Y. 379 (certiorari denied, 298 U. S. 675). In that case it was held that an action could not be maintained by a resident of the State of New York (who, however, was not a resident when the cause of action arose) against a foreign corporation where the maintenance of the action would impose an undue and unreasonable burden upon interstate commerce.

In the instant case, therefore, the Court of Appeals was not, and the Supreme Court of the United States will not be, called upon to pass upon the validity of the New York State statute. The Court of Appeals was merely called upon to apply the New York State statute as interpreted by it in the *Fawcett* case, *supra*, and to see if its application to the appellant here would impose an undue and unreasonable burden upon interstate or foreign commerce. The Court held that application of this statute to the facts of the appellant would not impose an undue and unreasonable burden upon interstate or foreign commerce. The Supreme Court of the United States will not in this appeal be called upon to pass upon the validity of the New York State statute; it will merely be called upon to apply the statute as

construed by the Court of Appeals in *Matter of Baltimore Mail S. S. Co.* v. *Fawcett*, 269 N. Y. 379, to the appellant in this case.

III. The questions presented upon this appeal are not as stated in paragraph V of the appellant's jurisdictional statement. The question is solely whether the application of the New York State statute, as construed by the Court of Appeals in the *Fawcett* case, *supra*, to this appellant would impose an undue and unreasonable burden upon interstate or foreign commerce in violation of Article 1, Section 8, clause 3, of the United States Constitution. The appellant is appealing under Section 237 (a), as amended, of the Judicial Code (Section 344, Title 28, of the United States Code Annotated). Under this section the Supreme Court of the United States does not have direct appeals jurisdiction where a State statute has merely been misapplied. Such a case can only be reviewed by the United States Supreme Court where the Court in its discretion, upon petition for a writ of certiorari, directs the review.

If the jurisdiction of the Supreme Court of the United States depended upon a claim that a State statute as applied to a particular appellant, or to particular facts, is unconstitutional, the Court would be deluged with appeals. Mr. Justice Brandeis, in his dissenting opinion in the case of *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 298, said:

> "If jurisdiction upon writ of error can be obtained by the mere claim in words that a state statute is invalid, if so construed as to 'apply' to a given state of facts, the right to a review will depend, in large classes of cases, not upon the nature of the constitutional question involved but upon the skill of counsel."

Whether a statute is valid depends on the *power* of the State to enact it. In the case of *Baltimore and Potomac Railroad Company* v. *Hopkins*, 130 U. S. 210, the Court said at 224:

> "Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise."

IV. This appeal does not present a question of law which will determine the rights of other litigants. It presents only a question of fact as to whether *this* appellant is so situated that the assumption of jurisdiction by the New York State courts over it, would impose an undue and unreasonable burden upon interstate and foreign commerce. The Court of Appeals of the State of New York said in its opinion in this case:

> "* * * the question here presented is not, as the petitioner contends, 'Are the principles of immunity under the Commerce Clause which are applied in the decision of this Court in the case of *Baltimore Mail S. S. Co. v. Fawcett*, 269 N. Y. 389, and in the decisions of the United States Supreme Court therein followed, applicable only in favor of corporate common carriers, or do they extend equally to all other foreign corporations engaged in interstate or foreign commerce?' The question which must be decided upon this appeal is whether under the principles of immunity under the commerce clause (U. S. Const., art. I, sec. 8), applied in the case of *Matter of Baltimore S. S. Co. v. Fawcett* (*supra*), the exercise of jurisdiction by the Supreme Court of the state in *this* suit which *these* plaintiffs have attempted to bring against *this* defendant in accordance with the laws of this state, is obnoxious to the commerce clause."

A decision on this question by the Supreme Court of the United States either on appeal or on certiorari would not determine any principle applicable to other cases. It would decide merely that the appellant could or could not be sued in the State Court of New York, and such a determination would depend upon whether assertion of jurisdiction over the appellant by the New York State Courts would impose

an undue and unreasonable burden upon foreign commerce. This question of fact would again have to be decided by this court whenever the question was put in issue by a party to an action.

The question of course is of no public importance or interest. The Supreme Court of the United States therefore does not have jurisdiction on a direct appeal and should not assume jurisdiction on a petition for a writ of certiorari.

V. For the reasons we have stated, the appeal herein is frivolous and does not raise a substantial Federal question.

VI. The jurisdictional statement of the appellant was not submitted to the Presiding Judge of the State Court allowing the appeal, directly contrary to Rule 12, paragraph 1, and Rule 46, paragraph 2, of the Rules of the Supreme Court of the United States. The appeal herein was allowed by the Presiding Judge of the Court of Appeals on March 7, 1942. The jurisdictional statement was not presented to him until March 24, 1942, whereupon he allowed it to be filed. The jurisdictional statement was not served by the appellant upon the appellees until March 25, 1942, or 18 days after the appeal was allowed, contrary to paragraph 2 of Rule 12 of the Supreme Court of the United States.

VII. The Supreme Court of the United States as recently as November, 1941, in *Baltimore & Ohio Railroad Co.* v. *Kepner,* 86 L. Ed. 37, expressed views directly opposed to the appellant's contention in this appeal.

Respectfully submitted,

SULLIVAN & CROMWELL,
Attorneys for Appellees.